A

**OOI CHEE SEONG & ANOR**

**v.**

**PP**

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEALS NO: P-05-259-2010 & P-05-260-2010]

C

25 MARCH 2014

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Appeal against conviction and sentence - Three charges for trafficking in dangerous drugs - Second charge amended to possession - Appellants*

D

*sentenced to death for all three charges - Whether amended charge was read - Whether plea was taken - Whether appellants allowed to recall witness - Whether conviction and sentence safe*

***CRIMINAL LAW:*** *Dangerous drugs - Trafficking - Drugs found in condominium unit - Whether appellants mere visitors to condominium unit*

E

*- Whether appellants real owner of drugs found - Whether trial judge sufficiently appreciated appellants' defence - Whether trial judge imposed higher burden on defence - Whether conviction and sentence safe*

***CRIMINAL PROCEDURE:*** *Charge - Amendment of charge - Court*

F

*amended second charge under s. 39B of Dangerous Drugs Act 1952 with charge under s. 12(2) of same Act - Whether amended charge was read - Whether plea was taken - Whether appellants allowed to recall witness - Whether conviction and sentence safe - Criminal Procedure Code, ss. 162, 425*

G

***EVIDENCE:*** *Witness - Failure by prosecution to call witness - Whether witnesses were material to prosecution's case - Whether witnesses were occupiers of condominium unit - Whether witnesses had care and management of condominium unit - Whether adverse inference should be*

H

*invoked - Evidence Act 1950, s. 114(g) - Dangerous Drugs Act 1952, s. 37(b)*

On 7 October 2003, ASP Ahmad Radzi Ahmad ('SP7') led a police party to a condominium unit ('unit'). Upon forcibly entering the unit, SP7 saw the appellants running towards one of the back rooms. SP7 subsequently arrested the appellants. A search was conducted in the master bedroom where an assortment of

I

paraphernalia for drugs processing suspected to be heroin was found. SP7 also found various types of drugs and equipments in another smaller room. SP7 seized all the items found from the master bedroom and the smaller room. Both the appellants were charged and tried under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 395.8g heroin dan 296g monoacetylmorphines ('first charge'), 972.3g ketamine ('second charge') and 52.8g methamphetamine ('third charge'). At the end of the prosecution's case, the High Court Judge amended the second charge to one of possession under s. 12(2) and s. 12(3) of the DDA. The High Court found both the appellants guilty in respect of all the three charges and sentenced them to death although the second charge was amended to one of possession. According to the appeal records, the amended charge was not read and no plea was taken. The appellants were also not allowed to recall or re-summon and examine witnesses pursuant to s. 162 of the Criminal Procedure Code ('CPC'). In their defence, the appellants contended that one Ang Kim Hock ('Ang') was the occupier of the condominium unit who had invited both the appellants to the condominium unit as visitors but had left the unit in a hurry upon receiving a phone call. Thereafter both the appellants were arrested and were taken to the master bedroom where they were informed about the drugs found. They were then taken to the car park by the police where both the appellants saw Ang who was in handcuffs. The first appellant also testified that the condominium unit was rented by an individual by the name of Chew Leong Ming ('Chew'). Thus, the tenor of the defence of both the appellants showed that the traffickers were Ang and Chew and the appellants had absolutely nothing to do with the drugs in the condominium unit. To support their versions pertaining to the existence of an individual by the name of Ang, the appellants called Ahmad Khadri bin Ramli who was the Ketua Inspektor Penjara of Pusat Pemulihan Akhlak Muar ('DW3') and Mohd Fardhi bin Ahmad ('DW4'). Both DW3 and DW4 testified that Ang was a real person and that on 7 October 2003 Ang was under preventive detention for his involvement in drugs. The defence applied to recall DW4 in order to establish when and where Ang was arrested but the High Court Judge refused to accede to the defence application. Although there was no evidence led by the prosecution to show that Ang could not be traced, Ang was not called as a witness by the prosecution to rebut the appellants' version. The issues that arose for

A determination were *inter alia* (i) whether the prosecution's failure to call or offer Ang and Chew as witness had compromised the case for the prosecution; and (ii) whether the High Court Judge erred in failing to sufficiently consider the defence case.

B **Held (allowing appeal; setting aside conviction and sentence; acquitting and discharging appellants)**
**Per Abdul Malik Ishak JCA delivering the judgment of the court:**

C **(1)** All courts have the jurisdiction to alter or add to any charge framed before the judgment provided that the provisions of s. 158 of the CPC were complied with. The High Court Judge had breached s. 159 of the CPC which provided that if a charge was altered or added, the court could proceed to hear the case after taking the plea from the accused person, D provided it does not prejudice the accused in his defence or the prosecution in the conduct of the case. The denial of the right to recall or re-examine a witness pursuant to s. 162 of the CPC vitiated the trial and was incurable. (paras 4-6 & 8)

E **(2)** In order to establish its case beyond reasonable doubt, the prosecution must disprove or negate the defence version. The prosecution must call Ang to afford him the opportunity to rebut and deny that he was the occupier of the condominium unit and to break the nexus that the drugs found in the F condominium unit belonged to him. However, the prosecution offered no response to rebut or disprove the appellants' version about Ang. The failure to call Ang attracted the adverse inference under s. 114(g) of the Evidence Act 1950, prejudiced the defence and created a gap in the prosecution's G case. Thus, the failure by the prosecution to call Ang as a witness was fatal. (paras 44-47)

**(3)** Section 425 of the CPC provides wide powers to the court, at any stage of inquiry, trial or other proceeding, to summon, H examine, and re-examine any person in attendance or those who had given evidence if their evidence was essential to the just decision of the case. DW4 had the relevant information to provide the exact date and place where Ang was arrested. If the application to recall DW4 was allowed, the information I about Ang would have corroborated the appellants' story that Ang was arrested on the same day at the car park. Thus, the application to recall DW4 was not frivolous. (paras 50-52)

**(4)** Section 37(b) of the DDA should be invoked against Chew because as a tenant, Chew was deemed to have the "care or management" of the condominium unit. By reason of the presumption under s. 37(b) of the DDA, the prosecution should call Chew so as to exclude Chew as having "care and management" of the condominium unit and as the owner of the drugs. The failure to call Chew had undermined the prosecution's case. The High Court Judge should have invoked the adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution for failing to call Chew. (paras 55, 57-59)

**(5)** The High Court Judge had failed to sufficiently appreciate the defence of the appellants. The High Court Judge had construed the case of *Mat v. PP* wrongly and as a result, had imposed a higher burden in law to the detriment and disadvantage of both the appellants. The conduct of flight by the appellants could be construed as natural reaction of pure panic bearing in mind that three or four shots were fired by the police personnel in an attempt to gain entry into the condominium unit. As the police personnel did not identify themselves, the issue of flight was resolved in favour of the appellants. (paras 63-67)

***Bahasa Malaysia*** *Translation Of Headnotes*

Pada 7 Oktober 2003, ASP Ahmad Radzi Ahmad ('SP7') telah mengetuai sepasukan polis ke sebuah kondominium ('unit'). Apabila memasuki unit tersebut secara paksa, SP7 melihat perayu-perayu berlari ke arah bilik belakang. SP7 kemudiannya menangkap perayu-perayu. Suatu carian telah dijalankan di bilik tidur utama di mana pelbagai jenis peralatan untuk memproses dadah disyaki heroin telah dijumpai. SP7 juga menjumpai pelbagai jenis dadah dan peralatan di dalam sebuah bilik yang lebih kecil. SP7 merampas semua barangan yang ditemui dari bilik tidur utama dan bilik yang lebih kecil. Kedua-dua perayu telah didakwa dan dibicarakan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') bagi pengedaran 395.8g heroin dan monoacetylmorphines 296g ('tuduhan pertama'), 972.3g ketamine ('tuduhan kedua') dan 52.8g methamphetamine ('tuduhan ketiga'). Di akhir kes pendakwaan, Hakim Mahkamah Tinggi telah meminda pertuduhan kedua kepada milikan di bawah s. 12(2) dan s. 12(3) ADB. Mahkamah Tinggi mendapati kedua-dua perayu bersalah atas ketiga-tiga pertuduhan

dan menjatuhkan hukuman mati ke atas mereka walaupun pertuduhan kedua telah dipinda kepada milikan. Menurut rekod rayuan, pertuduhan terpinda tersebut tidak dibacakan kepada perayu-perayu dan tiada pengakuan diambil. Perayu juga tidak dibenarkan memanggil semula dan memeriksa saksi menurut s. 162 Kanun Tatacara Jenayah ('KTJ'). Dalam pembelaan mereka, perayu-perayu menghujahkan bahawa seorang Ang Kim Hock ('Ang') adalah penghuni unit kondominium tersebut dan telah menjemput kedua-dua perayu ke unit kondominium tersebut sebagai pelawat tetapi Ang telah meninggalkan unit tersebut secara terburu-buru apabila menerima panggilan telefon. Sejurus selepas itu, kedua-dua perayu telah ditangkap dan dibawa ke bilik tidur utama di mana mereka dimaklumkan mengenai dadah yang dijumpai. Mereka kemudiannya dibawa ke tempat letak kereta oleh polis di mana kedua-dua perayu telah melihat Ang digari. Perayu pertama juga telah memberi keterangan bahawa unit kondominium tersebut disewa oleh individu bernama Chew Leong Ming ('Chew'). Oleh itu, pembelaan kedua-dua perayu menunjukkan bahawa pengedar yang sebenar adalah Ang dan Chew dan perayu-perayu tiada sebarang kaitan dengan dadah yang dijumpai di unit kondominium tersebut. Untuk menyokong versi mereka berkaitan dengan kewujudan individu yang bernama Ang, perayu-perayu telah memanggil Ahmad Khadri bin Ramli yang merupakan Ketua Inspektor Penjara Pusat Pemulihan Akhlak Muar ('DW3') dan Mohd Fardhi bin Ahmad ('DW4'). Kedua-dua DW3 dan DW4 telah memberi keterangan bahawa Ang adalah seorang yang benar-benar wujud dan pada 7 Oktober 2003 Ang berada di bawah tahanan pencegahan bagi penglibatannya dengan dadah. Pihak pembelaan telah memohon untuk memanggil semula DW4 bagi membuktikan bila dan di mana Ang ditangkap tetapi Hakim Mahkamah Tinggi menafikan permohonan pembelaan. Walaupun tiada bukti yang dikemukakan oleh pihak pendakwaan untuk menunjukkan bahawa Ang tidak dapat dikesan, Ang tidak dipanggil sebagai saksi oleh pihak pendakwaan untuk menangkis versi perayu-perayu. Isu-isu yang dibangkitkan untuk penentuan, antara lain, adalah (i) sama ada kegagalan pihak pendakwaan untuk memanggil atau menawarkan Ang dan Chew sebagai saksi telah menjejaskan kes bagi pihak pendakwaan; dan (ii) sama ada Hakim Mahkamah Tinggi terkhilaf apabila gagal menimbangkan kes pembelaan dengan secukupnya.

**Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman; melepaskan dan membebaskan perayu-perayu)**

**Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:**

**(1)** Semua mahkamah mempunyai bidang kuasa untuk meminda atau menambah mana-mana pertuduhan yang dirangkakan sebelum penghakiman jika peruntukan s. 158 KTJ dipatuhi. Hakim Mahkamah Tinggi telah melanggar s. 159 KTJ yang memperuntukkan bahawa jika sesuatu pertuduhan dipinda atau ditambah, mahkamah boleh mendengar kes tersebut selepas mengambil pengakuan daripada tertuduh, dengan syarat ia tidak memudaratkan tertuduh dalam pembelaannya atau pendakwaan dalam pengendalian kes. Penafian hak untuk memanggil semula atau memeriksa semula saksi menurut s. 162 KTJ telah mencacatkan perbicaraan dan tidak boleh dipulihkan.

**(2)** Untuk mewujudkan kes melampaui keraguan munasabah, pihak pendakwaan perlu menyangkal atau menolak versi pembelaan. Pihak pendakwaan perlu memanggil Ang untuk memberikannya peluang untuk menangkis dan menafikan bahawa dia adalah penghuni unit kondominium tersebut dan untuk mematahkan kaitan bahawa dadah yang dijumpai di unit kondominium tersebut adalah miliknya. Pihak pendakwaan tidak memberikan sebarang tindak balas bagi menangkis atau menyangkal versi perayu mengenai Ang. Kegagalan untuk memanggil Ang telah membangkitkan peruntukan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950, memprejudiskan pembelaan dan telah mewujudkan jurang dalam kes pendakwaan. Oleh itu, kegagalan pihak pendakwaan untuk memanggil Ang sebagai saksi adalah memudaratkan.

**(3)** Seksyen 425 KTJ memberi kuasa yang luas kepada mahkamah di mana-mana peringkat siasatan, perbicaraan atau prosiding lain untuk memanggil, memeriksa, dan memeriksa semula sesiapa yang hadir atau yang telah memberi keterangan jika keterangan mereka adalah penting untuk keputusan yang adil dalam kes tersebut. DW4 mempunyai maklumat yang berkaitan untuk memberikan dengan tepat tarikh dan tempat di mana Ang ditangkap. Jika permohonan untuk memanggil semula DW4 dibenarkan, maklumat tentang Ang akan menyokong cerita perayu bahawa Ang telah ditangkap pada hari yang sama di tempat letak kereta. Oleh itu, permohonan untuk memanggil semula DW4 bukanlah remeh.

**(4)** Seksyen 37(b) ADB sepatutnya dibangkitkan terhadap Chew kerana sebagai penyewa, Chew telah disifatkan mempunyai "penjagaan atau pengurusan" unit kondominium tersebut. Disebabkan oleh anggapan di bawah s. 37(b) ADB, pihak pendakwaan perlu memanggil Chew untuk mengecualikan Chew sebagai mempunyai "penjagaan dan pengurusan" unit kondominium tersebut dan sebagai pemilik dadah. Kegagalan untuk memanggil Chew melemahkan kes pendakwaan. Hakim Mahkamah Tinggi sepatutnya membangkitkan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan kerana gagal memanggil Chew.

**(5)** Hakim Mahkamah Tinggi telah gagal mempertimbangkan pembelaan perayu-perayu dengan secukupnya dan dengan itu telah mengenakan beban yang lebih tinggi dalam undang-undang sehingga memudaratkan dan merugikan kedua-dua perayu. Tindakan melarikan diri oleh perayu-perayu, boleh ditafsirkan sebagai tindak balas semulajadi kerana panik mempertimbangkan bahawa tiga atau empat das tembakan dilepaskan oleh pasukan polis dalam cubaan untuk memasuki unit kondominium tersebut. Oleh sebab pasukan polis tidak memperkenalkan diri mereka, isu melarikan diri diputuskan berpihak kepada perayu-perayu.

**Case(s) referred to:**

*Aedy Osman v. PP [2011] 1 CLJ 273 FC* ***(refd)***
*Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC* ***(refd)***
*Ang Kian Chai v. PP & Another Appeal [2012] 4 MLRA 456* ***(refd)***
*Anwar Hussain and another v. The State AIR 1952 Assan 417* ***(refd)***
*Azizan Yahaya v. PP [2012] 8 CLJ 405 CA* ***(refd)***
*Burhanuddin Benjamil lwn. PP [2013] 1 LNS 149 CA* ***(foll)***
*Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC* ***(foll)***
*Harihar Chakravarty v. State of West Bengal AIR 1954 SC 266* ***(refd)***
*Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC* ***(refd)***
*Lee Ngin Kiat v. PP [1993] 1 SLR(R) 695 CA* ***(refd)***
*Mat v. PP [1963] 1 LNS 82 HC* ***(refd)***
*PP v. Chia Leong Foo [2000] 4 CLJ 649 HC* ***(refd)***
*PP v. Ng Teck Hong & Anor [1990] 1 CLJ 1195; [1990] 2 CLJ (Rep) 780 HC* ***(refd)***
*PP v. Phon Nam [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 SC* ***(refd)***
*PP v. Rosyatimah Neza & Anor [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364 HC* ***(refd)***
*Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC* ***(refd)***
*Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC* ***(refd)***
*Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA* ***(foll)***
*Yoong Hock Pin v. PP [1977] 1 LNS 161 FC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 158, 159, 162, 425
Dangerous Drugs Act 1952, ss. 37(b), 37A(1)(b)
Evidence Act 1950, s. 114(g)

*For the appellants - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co*
*For the respondent - Munahlyza Mustafa; DPP*

*[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-19-2005]*

*Reported by Sandra Gabriel*

## JUDGMENT

**Abdul Malik Ishak JCA:**

### Introduction

**[1]** Both the appellants were tried before the Penang High Court for three charges of trafficking in dangerous drugs. The three charges were worded as follows:

> First charge
>
> Bahawa kamu bersama-sama pada 7hb Oktober 2003, jam lebih kurang 4.45 petang, di alamat no: C-27-09, E Park Kondo, Jalan Batu Uban, Georgetown, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, dengan niat bersama telah memperedarkan dadah berbahaya iaitu 691.8 gram (395.8 gram Heroin dan 296.0 gram Monoacetylmorphines), dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama yang dibaca bersama seksyen 34 Kanun Keseksaan.
>
> Second charge
>
> Bahawa kamu bersama-sama pada 7hb Oktober 2003, jam lebih kurang 4.45 petang, di alamat no: C-27-09, E Park Kondo, Jalan Batu Uban, Georgetown, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, dengan niat bersama telah memperedarkan dadah berbahaya iaitu 972.3 gram Ketamine, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta

A Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama yang dibaca bersama seksyen 34 Kanun Keseksaan.

Third charge

B Bahawa kamu bersama-sama pada 7hb Oktober 2003, jam lebih kurang 4.45 petang, di alamat no: C-27-09, E Park Kondo, Jalan Batu Uban, Georgetown, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, dengan niat bersama telah memperedarkan dadah berbahaya iaitu 52.8 gram Methamphetamine, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1) C (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama yang dibaca bersama seksyen 34 Kanun Keseksaan.

**[2]** At the end of the prosecution's case, the learned High D Court Judge amended the second charge to one of possession. The notes of evidence at pp. 310 to 311 of the appeal record at jilid 3 carried this caption:

Mahkamah : Keputusan di akhir kes pendakwaan. Mahkamah bacakan keputusan ringkas di akhir kes E pendakwaan. Kes *prima facie* dibuktikan. OKT-OKT diperintah bela diri di atas pertuduhan pertama, pertuduhan kedua pindaan bagi pertuduhan di bawah seksyen 12(2) dan seksyen 12(3) ADB dan pertuduhan ketiga.

F **[3]** At the end of the defence case, the learned High Court Judge found both the appellants guilty in respect of all the three charges and sentenced them to death. But the second charge was amended to one of possession. This is one of the unsatisfactory features of this appeal. At p. 356 of the appeal record at jilid 3, G the notes of evidence recorded the following passages:

Keputusan : OKT1 dan OKT2 didapati bersalah ke atas ketiga-tiga pertuduhan dan disabitkan. OKT1 dan OKT2 dihukum mati mandatory dan digantung di leher H sehingga mati seperti yang diperuntukkan di bawah seksyen 277 KAJ.

**[4]** It is germane to mention that when the second charge was amended to possession, the appeal records do not show that the I amended charge was read and the plea taken by learned High Court Judge. The appeal records do not show that the appellants

were allowed to recall or resummon and examine witnesses who may have been examined, in breach of s. 162 of the Criminal Procedure Code ("CPC") which enacts as follows:

> Recall of witnesses when charge altered
>
> 162. Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

**[5]** According to the case of *Anwar Hussain and another v. The State* AIR 1952 Assan 417, the denial of the right to recall or re-examine a witness vitiates the trial and it is incurable.

**[6]** It goes without saying that all courts have the jurisdiction to alter or add to any charge framed before judgment is pronounced, provided the provisions of s. 158 of the CPC are complied with. The jurisdiction to alter a charge or add a new charge as envisaged in s. 158 of the CPC is exercisable when there is material before the court to justify it (*Harihar Chakravarty v. State of West Bengal* AIR 1954 SC 266). Section 158 of the CPC enacts as follows:

> Court may alter or add to charge
>
> 158. (1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

**[7]** It is the trial court and not the appellate court who has the jurisdiction to alter a charge or add a new charge before judgment is pronounced. According to the Federal Court in *Yoong Hock Pin v. PP* [1977] 1 LNS 161; [1977] 1 MLJ 178, it was not competent for learned judge on appeal to amend the charge. But the position in the Republic of Singapore is different where the court in *Lee Ngin Kiat v. PP* [1993] 1 SLR(R) 695, CA, held that the appellate court has the jurisdiction to alter or add a new charge. However, all is not lost. Section 60 of the Courts of Judicature Act 1964 empowers the Court of Appeal to "make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised."

**[8]** The learned High Court Judge also breached s. 159 of the CPC. That section provides that if the charge is altered or added, the court can proceed to hear the case after taking the plea from the accused person, provided it does not, in the opinion of the court, prejudice the accused in his defence or the prosecution in the conduct of the case.

**[9]** The learned High Court Judge acknowledged the mistake which he made and implored this court to review, rectify, and put it right. At p. 125 of the appeal record at jilid 1, by way of a "postscript", His Lordship had this to say:

> (154) Mahkamah ini ingin menjelaskan bahawa terdapat kesilapan di dalam penghukuman bagi pertuduhan kedua setelah penghakiman kes dibacakan. Bagi Pertuduhan Pertama dan Pertuduhan Ketiga adalah merupakan hukuman mandatori dan ianya tiada pindaan seperti yang telah diputuskan dan dijatuhkan. Bagaimanapun bagi pertuduhan kedua ianya hendaklah merujuk kepada pertuduhan kedua pindaan seperti yang telah dipinda oleh mahkamah ini di akhir kes pendakwaan yang membawa hukuman di bawah seksyen 12(3) Akta Dadah Berbahaya, 1952 dan dengan itu kesalahan dan sabitan ke atas Tertuduh Pertama dan Tertuduh Kedua bagi pertuduhan kedua adalah dimaksudkan bagi Pertuduhan Kedua Pindaan bagi milikan (possession) 972.3 gram Ketamine yang membawa hukuman maksima lima tahun penjaraan. Oleh itu hukuman bagi Pertuduhan Kedua ke atas tertuduh pertama dan tertuduh kedua hendaklah disemak di peringkat rayuan dan digantikan dengan hukuman di bawah seksyen 12(3) Akta seperti yang telah dipinda oleh mahkamah bagi Pertuduhan Kedua Pindaan tersebut.

**[10]** This means that the appeal in regard to the second charge must be allowed and we were urged to make that order accordingly.

**[11]** We will now proceed to the heart of the matter.

## The Case For The Prosecution

**[12]** We can do no better than to begin by narrating the evidence of ASP Ahmad Radzi Ahmad ("SP7") – the raiding officer and the leader of the raiding party. Within a narrow compass, SP7 testified along the following lines. That on 7 October 2003, SP7 led a police party to the condominium unit at No. 9 on the 27th floor of E Park Kondo situated along the road as mentioned in the first and third charges. Upon arrival, SP7 and his men observed the condominium unit for approximately 45

minutes. At about 4.45pm, SP7 ordered his police personnel to forcibly enter the condominium unit by cutting the grill door and by opening the wooden door with the aid of a "door buster". SP7 and his police personnel succeeded in gaining entry and, once inside, SP7 noticed that there was no one inside the condominium unit. SP7 then proceeded to the front room and he found that it was locked. SP7 then fired three shots at the door knob, applied pressure, and forced it open. The door was opened but no one was inside. SP7 and his police personnel then proceeded to the back rooms through a passage. At this juncture, SP7 saw two male Chinese, later identified as the appellants, running towards one of the back rooms. This room was described by SP7 as the second room. SP7 instructed his police personnel to arrest the appellants. According to SP7, the first appellant put up a struggle and was slightly injured on the forehead while the second appellant was arrested whilst being under the bed.

**[13]** After both the appellants were arrested, SP7 cautioned them orally, in simple Malay language that was easy to understand, pursuant to s. 37A(1)(b) of the Dangerous Drugs Act 1952 ("DDA").

**[14]** In the presence of both the appellants, a search was conducted in the kitchen area. That search led to the recovery of some illegal items from the kitchen cabinets but these illegal items were insignificant and they bore no relevance to the charges against both the appellants.

**[15]** Still accompanied by both the appellants, the master bedroom was next to be searched. According to SP7, the master bedroom had no furniture and on the floor, there was an assortment of paraphernalia for drugs processing suspected to be heroin. Inside the master bedroom, there was a smaller room separated only by a wooden sliding door. It is inside this smaller room that SP7 also found various types of drugs and equipment. SP7 seized all the items found from the master bedroom and the smaller room and he listed them down in the search list as reflected in exh. "P87" at pp. 425 to 427 of the appeal record at jilid 3.

**[16]** The various items found in the master bedroom are listed in exh. "P87" at p. 426 of the appeal record at jilid 3 under caption "Dalam Bilek Utama". And the learned High Court Judge in his

grounds of judgment reproduced the various items found in the master bedroom at p. 19 of the appeal record at jilid 1 in this manner in its original text:

(a) dua bungkusan kertas putih (P59 dan P61) mengandungi serbuk disyaki heroin nombor 3 dengan anggaran berat 1,675 g;

(b) sebuah besen steel (P68) mengandungi serbuk disyaki heroin nombor 3 yang sedang dimasak. Anggaran berat 1,080g;

(c) sebuah dapur gas jenama 'Golden Fuji' model GF8000 (P29);

(d) satu senduk kayu (P68A);

(e) sebuah besen steel kosong (P69);

(f) satu sudip kayu (P69A);

(g) sebuah besen plastik warna merah (P66) mengandungi serbuk disyaki heroin nombor 3 dalam proses campuran. Anggaran berat serbuk ialah 6,170g;

(h) sebuah kipas angin jenama 'KDK';

(i) sebuah alat impulse sealer jenama 'Brother' (P31);

(j) sebuah dapur gas warna kuning jenama 'Pensonic'; dan

(k) sebuah mesin penimbang jenama 'Tanita' model 1144 (P30).

**[17]** While the various items seized from the smaller room are listed in the search list in exh. "P87" at p. 426 of the appeal record at jilid 3 under caption "Dalam Bilek Kecil Tepi Tandas Bilek Utama" and spilling over to p. 427 thereto. The learned High Court Judge reproduced the various items seized from the smaller room in his grounds of judgment at pp. 19 to 20 of the appeal record at jilid 1 in its original text in this way:

(i) tiga bungkusan plastik mengandungi 12 tin berbentuk cylinder gas jenama 'City Flame' (P33(1-4), P34(1-4), P35(1-4));

(ii) satu bungkusan plastik mengandungi 4 tin cylinder gas jenama 'Butane Fuel Catridge' (P36(1-4));

(iii) satu bungkusan plastik lutsinar mengandungi serbuk disyaki 'Kafein'. Anggaran berat 50 kg. (P65);

(iv) sebuah besen plastik warna biru (P67) berisi 3 botol besar cecair (P70, P71 dan P72) dan 2 botol kecil cecair (P73 dan P74) berisi cecair chloroform serta 4 botol plastik asid hydrochloric (P74, P75, P76 dan P77); dan

(v) satu beg plastik kuning jenama 'Pensonic' (P44) berisi 1 kotak (P45) di dalamnya berisi 1 bungkusan surat khabar (P46) mengandungi serbuk disyaki dadah ecstacy. Anggaran berat 540 gram. Satu bungkusan plastik lutsinar (P48) disyaki serbuk 'ketamin'. Anggaran berat 614 gram. Satu plastik hitam (P51) mengandungi 30 paket plastik lutsinar (P52(1-30)) disyaki pil ectacy warna merah dan 1 plastik hitam (P54) mengandungi 22 paket plastik lutsinar (P55(1-22) disyaki pil ectacy warna biru (jumlah keseluruhan pil ialah 5,200 biji).

**[18]** SP7 further testified that the drugs in the steel basin were being cooked as the steel basin was placed on the gas stove which was turned on. According to SP7, all the seized items were then taken to "Ibu Pejabat Kontinjen" ("IPK") at Pulau Pinang.

**[19]** The evidence of the other prosecution witnesses supported the version advanced by SP7.

**[20]** In due course, the exhibits were sent to the government chemist by the name of Hj Shaharudin bin Hasan ("SP6") for analysis and he confirmed them to be dangerous drugs within the meaning of the DDA and thus formed the subject matter of the charges.

**The Defence Of Both The Appellants**

**[21]** The versions advanced by both the appellants tallied with one another. They called Ahmad Khadri bin Ramli ("DW3") and Mohd Fardhi bin Ahmad ("DW4") to support their versions pertaining to the existence of an individual by the name of Ang Kim Hock ("Ang").

**[22]** Both the appellants testified that they were friends and that they went to the condominium unit together on that fateful day. Both of them knew Ang, a bookie, and that the first appellant knew Ang for about 20 years.

**[23]** Both the appellants and Ang came from the same kampung. The first appellant testified that they accepted Ang's invitation and went to the condominium unit. Both the appellants arrived at the condominium unit at about 3.45pm. At that time, Ang was alone

and he opened the door of the condominium unit to allow both the appellants to get inside. All the three of them then started to chit-chat in the hall of the said condominium unit.

**[24]** Both the appellants testified that a short while later, Ang received a telephone call. Ang informed both the appellants that he had to quickly leave to collect a debt and asked both the appellants to wait for him for a short while.

**[25]** After Ang left the condominium unit, both the appellants remained in the hall watching television. They also chatted with one another while watching television and this went on for about ten minutes. They became tired and decided to rest in the second room.

**[26]** The first appellant testified that there were two single beds and one double bed in the second room. While both the appellants were in the second room, they heard sounds of the main door to the condominium unit being forced open. They then heard three or four sounds of explosions. Both of them became frightened and they decided to take cover. At that juncture, both the appellants saw armed men rushing into the second room. The armed men assaulted the first appellant and he was injured on his forehead.

**[27]** Both the appellants were arrested and they were taken to the master bedroom where they were informed that drugs were recovered. They were then taken to the car park by the police personnel. At the car park, both the appellants saw Ang who was in handcuffs.

**[28]** Both the appellants denied any connection with the drugs found in the condominium unit.

**[29]** The first appellant testified that the condominium unit were rented by an individual by the name of Chew Leong Ming ("Chew"). According to the first appellant, prior to that fateful day, he had been to the condominium unit on two or three occasions. And on one such occasion Ang had introduced Chew to him.

**[30]** In essence, the defence of both the appellants was quite simple. They said that they were mere visitors to the condominium unit and had absolutely nothing to do with the drugs in the condominium unit. The tenor of the defence of both the appellants showed that the traffickers were Ang and Chew.

## Analysis

**[31]** Before us, two main issues were raised and they may be stated as follows:

(i) That learned High Court Judge failed to appreciate that the prosecution's failure to call or offer Ang and Chew has compromised the case for the prosecution; and

(ii) That learned High Court Judge erred in failing to sufficiently consider the defence case.

## The First Issue

**[32]** Both the appellants submitted through their learned defence counsel that the failure on the part of the prosecution to call or offer Ang has seriously compromised the case for the prosecution. It was submitted that Ang was the occupier of the condominium unit and it was Ang who had invited both the appellants to the condominium unit on that fateful day. This particular line of defence was put to SP7 as seen at pp. 240 to 241 of the appeal record at jilid 2. For convenience, the material parts of SP7's evidence are now reproduced:

Q: Saya katakan penghuni flat tersebut pada masa serbuan adalah seorang lelaki Cina yang bernama Ang Kim Hock I/C No. 690401-07-5347?

J: Tidak setuju.

Q: Saya katakan lelaki Cina ini Ang Kim Hock yang telah lebih kurang 3.30-3.45 petang pada 7/10/2003 yang menjemput kawannya OKT1 dan OKT2 memasuki flat C27-09?

J: Saya tidak pasti.

Q: Saya katakan OKT1 dan OKT2 menunggu kawan mereka Ang Kim Hock untuk kembali ke flat tersebut bila pasukan polis serbu masuk ke flat tersebut?

J: Tak setuju.

Q: Adakah awak tahu pada masa dan hari pada sebelah petang hari yang sama lelaki ini Ang Kim Hock telah ditangkap di E-Park Condo?

J: Saya tak pasti.

A Q: Saya katakan Ang Kim Hock ini telah ditahan 60 hari sebelum dia dihantar ke Detention Centre di Muar?

J: Saya tidak pasti.

Q: Lepas ditahan di Muar, dihantar pula ke Batu Gajah kerana
B ditahan kerana libatkan diri dengan dadah?

J: Saya tak pasti.

**[33]** Chief Inspector Tee Ah Chew ("SP9"), the investigating officer of the case, was cross-examined in regard to Ang being the
C occupier of the condominium unit and that Ang was also arrested on that fateful day. This line of cross-examination of SP9 can be seen at p. 295 of the appeal record at jilid 2:

Q: Saya katakan penghuni flat itu adalah seorang lelaki Cina
D yang bernama Ang Kim Hock?

J: Tidak tahu.

Q: Saya katakan Ang Kim Hock ini juga telah ditangkap pada petang yang sama seperti OKT1 dan OKT2 berkaitan kes
E dadah di E-Park Condo?

J: Tidak tahu.

**[34]** Continuing at p. 296 of the appeal record at jilid 2, SP9 was asked the following question and he gave a straight forward
F answer. We will now reproduce that brief exchange:

Q: Sebagai I.O. awak boleh dengan maklumat ini mengesan jika Ang ini telah ditangkap berkaitan pengedaran dadah di E-Park Condo pada hari yang sama?

G J: Saya boleh kesan tangkapan tersebut.

**[35]** It is not disputed that Ang existed. That Ang is a real person and not a fictitious character can never be disputed. DW3 and DW4 were called by both the appellants. These defence
H witnesses added mileage to the appellants' defence and gave it a touch of credibility. Both DW3 and DW4 testified that Ang was a real person and that, at the material time, Ang was under preventive detention for his involvement in drugs.

**[36]** DW3 was the Ketua Inspektor Penjara of Pusat Pemulihan
I Akhlak ("PPA") Muar. He gave evidence and tendered the detention order and the allegation of facts dated 5 December 2003 which were marked as exhs. "D89A" at pp. 431 to 432 of the appeal record at jilid 3 and "D89B" at p. 433 of the appeal record at jilid 3 respectively.

**[37]** It is pertinent to note that SP9 was also cross-examined to show that Ang was sent to PPA Muar after being detained for 60 days. This can be seen at p. 295 of the appeal record at jilid 2:

Q: Ang telah ditahan 60 hari sebelum dihantar ke PPA Muar?

J: Tidak tahu.

**[38]** DW4 testified that, at the material time, he was with the Home Affairs Ministry and he confirmed that two detention orders were issued against Ang and he produced and tendered the detention order and allegations of facts dated 5 December 2003 as per exhs. "D90A" and "D90B" at p. 436 of the appeal record at jilid 3.

**[39]** At pp. 343 to 344 of the appeal record at jilid 3, DW4 testified in examination-in-chief that the date 7 October 2003 as referred to in exh. "D89B" at p. 433 of the appeal record at jilid 3 would usually refer to the date where the detainee was arrested. In its original text, this was what DW4 testified in examination-in-chief at pp. 343 to 344 of the appeal record at jilid 3:

> Tarikh 7/10/2003 yang terdapat di para (1) adalah tarikh yang saya dapatkan dari laporan polis yang KDN terima. Saya tidak ingat jika tarikh 7/10/2003 itu adalah tarikh Ang Kim Hock ditangkap. Adalah kebiasaan yang disebutkan dalam pengataan fakta alasan tahanan adalah tarikh orang tahanan itu ditangkap.

**[40]** It must be recalled that the date 7 October 2003 was the day where both the appellants were arrested. It corroborated the appellants' version that Ang was also arrested on that very day. And it is this aspect of the case that learned High Court Judge failed to appreciate. His Lordship was bound to objectively view the whole case from all angles so that both the appellants have a fair chance of being acquitted (per Edgar Joseph Jr SCJ in *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 at p. 5; [1993] 2 AMR 27 1135, SC, at p. 1141).

**[41]** The appellants' version in regard to Ang was rather simple. That Ang as the occupier of the condominium unit had invited both the appellants to the condominium unit as visitors. That being the case, Ang is the trafficker. It is trite law that the prosecution, in order to establish its case beyond reasonable doubt, must proceed to disprove or negate the defence's version.

A It is ideal to refer to the Federal Court case of *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 to support this proposition. There, Edgar Joseph Jr FCJ (as he then was) delivering the judgment of the court had this to say at p. 719:

> B To resume our discussion regarding the important point of misdirection as regards the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the Judge to have criticised the defence for having failed to put to the Investigating Officer, the name of Che Mat or the latter's telephone number or his place of abode, for the simple C reason that these particulars had been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution, to check on whether the appellant's version of the facts as they appeared in his cautioned statement and to which we have referred, was D true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the Investigating Officer having regard to their prior disclosure in the cautioned statement. In holding to the E contrary, the Judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed.

F **[42]** This would be followed by the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649, a decision of Augustine Paul J (later FCJ). There His Lordship aptly said at p. 676 of the report:

> As the prosecution has failed to negate the suggestions made by the defence in the course of its case it may still rebut the defence G advanced by cross-examination of the accused and his witnesses and/or, if possible, by calling Yee Chin Koon as a witness or tendering his police statement in evidence by re-opening its case at the end of the case for the defence.

H **[43]** James Foong FCJ in *Aedy Osman v. PP* [2011] 1 CLJ 273, at p. 283, writing for the Federal Court expressed the same sentiments:

> From the authorities cited by the appellant's counsel, it is incumbent upon the prosecution to call evidence to rebut any I claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

**[44]** In order to disprove or negate the appellants' version, the prosecution must call Ang to afford him the opportunity to rebut and deny that he was the occupier of the condominium unit. If called, Ang too would be able to break the nexus that the drugs found in the condominium unit belonged to him. Viewed from these perspectives, the omission by the prosecution to call Ang to the witness box was fatal.

**[45]** No evidence was led to show that Ang could not be traced. In fact, no attempts were ever made to trace and locate Ang. That being the case, it is right to say that the prosecution offered no response to rebut or disprove the appellants' version about Ang.

**[46]** In our judgment, this is a classic case where the prosecution failed to call a material witness in the person of Ang. There is no impediment for the prosecution to call Ang bearing in mind that the defence had already put to SP7 and SP9 about the importance of Ang to the factual matrix of the case. The prosecution was alerted that Ang figured prominently in the defence case. Thus, in order to disprove or negate the defence's version, the prosecution has no choice but to call Ang in order to establish its case beyond reasonable doubt.

**[47]** Even at the defence stage, the prosecution can still call Ang as a rebuttal witness provided it can show "that the suggested defences were of minimal, doubtful or marginal value" (to borrow the words of Augustine Paul J (later FCJ) in *PP v. Chia Leong Foo (supra)* at p. 678). Be that as it may, the failure or omission to call Ang attracted the adverse inference under s. 114(g) of the Evidence Act 1950 and it has also prejudiced the defence. To compound the matter further, the failure to call Ang breached the famous rule in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433, and it has also created a gap in the prosecution's case.

**[48]** The defence applied to recall DW4 in order to establish when and where Ang was arrested but the learned High Court Judge refused to accede to the defence application. This point was taken up before us as a basis to argue that there was procedural unfairness on the part of the learned High Court Judge in rejecting the defence application to recall DW4. Learned

counsel having conduct of the matter before the High Court gave the reason for wanting to recall DW4 and this can be seen at p. 345 of the appeal record at jilid 3:

> Dato' Sitham: Saya ingin recall DW4 untuk bawa rekod untuk tunjukkan maklumat tentang tarikh, tempat dan masa tangkapan Ang Kim Hock.
>
> Mahkamah: Permohonan pembelaan ditolak.

**[49]** The learned High Court Judge did not give any reasons for dismissing the defence application to recall DW4. However, in examination-in-chief, DW4 testified at pp. 343 to 344 of the appeal record at jilid 3 to the following effect:

> Jika saya ada rekod penuh saya akan dapat berikan tarikh dan tempat Ang Kim Hock ditangkap. Maklumat ini ada dalam laporan polis yang polis hantar ke KDN. Bagi perintah tahanan kedua saya keluarkan pada 7/12/2005 untuk tempoh selama dua tahun.

**[50]** It is quite plain that DW4 had the relevant information and was in a position to provide the exact date and place where Ang was arrested. Thus, the application to recall DW4 was not frivolous. If the application to recall DW4 was allowed, the information about Ang would certainly corroborate the appellants' story that Ang was arrested on the same day at the car park. With due respect, the learned High Court Judge did not exercise his judicial discretion properly when he dismissed the application to recall DW4.

**[51]** Section 425 of the CPC gives a wide power to the court at any stage of inquiry, trial or other proceeding to summon, examine, and re-examine any person in attendance or those who have given evidence if their evidence is essential to the just decision of the case. Indeed Mohamed Azmi SCJ in *Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243; [1986] 2 MLJ 33, SC, speaking for the Supreme Court laid down the threshold to apply s. 425 of the CPC and that was whether the evidence to be adduced "appears to it essential to the just decision of the case".

**[52]** It must be emphasised that the discretion to recall a witness cannot be exercised arbitrarily. Rather, it should be exercised judiciously, failing which appellate interference is warranted (*PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142; [1988] 3 MLJ 415, SC).

**[53]** In approaching the issue pertaining to the failure of the prosecution to call or offer Ang, we are guided by the approach suggested by Gopal Sri Ram JCA (as he then was) in *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773, at pp. 784 to 785 of the report. There His Lordship had this to say:

> In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 3 CLJ 371 CA.

**[54]** Learned High Court Judge did not apply the above mentioned guidelines in handling the issue of Ang. Instead, His Lordship speculated on many matters pertaining to Ang and asked questions which only Ang could answer. The following examples would suffice:

(a) At p. 118 of the appeal record at jilid 1, learned High Court Judge asked why Ang left the appellants in the condominium unit and never came back even after 45 minutes which would allow the appellants to see the drugs in the master bedroom and that would expose Ang's activities;

(b) At p. 119 of the appeal record at jilid 1, learned High Court Judge said that just because it was not put to the prosecution that Ang had changed clothes, it would mean that Ang had gone out with the same clothes when he was processing drugs in the second room;

(c) At p. 119 of the appeal record at jilid 1, learned High Court Judge commented that the appellants showed no reaction or failed to inform SP7 and Chief Inspector Mazli bin Abd Aziz (SP8) about the arrest of Ang at the car park;

(d) At p. 121 of the appeal record at jilid 1, learned High Court Judge surmised that if Ang had locked the doors, it would be more logical if Ang had only locked the wooden door; and

(e) At page 122 of the appeal record at jilid 1, learned High Court Judge concluded that Ang was not the occupier of the condominium unit.

**[55]** We will now consider the failure of the prosecution in not calling Chew. It cannot be denied that Chew is an important witness. He was the tenant of the condominium unit based on the tenancy agreement (exh. "P9") as seen at pp. 396 to 403 of the appeal record at jilid 3 that was produced by the prosecution. It must be recalled that the first appellant testified that Ang had introduced Chew to him once at the condominium unit. Thus, it is incumbent on the part of the prosecution to call Chew or to offer Chew to the defence. This was not done and it has seriously compromised the case for the prosecution.

**[56]** Since Chew was the tenant of the condominium unit, s. 37(b) of the DDA should be invoked against him. That section reads as follows:

> Presumptions
>
> 37. In all proceedings under this Act or any regulation made thereunder:
>
> (b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises.

**[57]** As a tenant, Chew shall be deemed to have the "care or management" of the condominium unit and he should be called by the prosecution or at least offered to the defence. Likewise, the accused persons in *PP v. Ng Teck Hong & Anor* [1990] 1 CLJ 1195; [1990] 2 CLJ (Rep) 780 and in *PP v. Rosyatimah Neza & Anor* [1989] 1 CLJ 481; [1989] 2 CLJ (Rep) 364; [1989] 1 MLJ 360 were tenants and the courts invoked the presumption under s. 37(b) of the DDA and held that they were deemed to have the "care or management" of the premises.

**[58]** The learned High Court Judge declined to invoke the adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution for failing to call Chew as reflected at p. 116 of the appeal record at jilid 1. His Lordship advanced the following reasons for refusing to invoke the adverse inference:

(a) That according to SP9, there was no furniture in the condominium unit except for the bed and the mattress in the second room;

(b) That the defence did not suggest to the prosecution witnesses which room Chew occupied;

(c) That the defence did not suggest to the prosecution witnesses that Chew was in the condominium unit before SP7 and his police personnel raided the premises; and

(d) That the defence did not suggest to the prosecution witnesses that Chew had locked the condominium unit.

**[59]** But, with respect, the tenancy agreement in exh. "P9" provided the causal link between the condominium unit and Chew Kok Chen Nam (SP2), the landlord of the condominium unit, did not testify that Chew was not the tenant. By reason of the presumption under s. 37(b) of the DDA, the prosecution should call Chew so as to exclude Chew as having "care and management" of the condominium unit and as the owner of the drugs. Unfortunately, this was not done. The failure to call Chew undermined the prosecution's case. The principle of exclusion found favour in a number of authorities. In *Ang Kian Chai v. PP & Another Appeal* [2012] 4 MLRA 456, Abdul Malik bin Ishak, JCA writing for the Court of Appeal had this to say at p. 461 of the report:

> (21) We are constrained to say, with respect, that the learned JC had gone off tangent and had completely misdirected herself when she held that the absence of Chen Jing had no consequence and that based on the evidence adduced it was sufficient to hold that the appellant had knowledge and control of the raw opium in the said house. Now, since the learned JC had earlier found that Chen Jing was a tenant and occupant of the said house and had free access to the entire house including the room where the raw opium was found by SP4, it can also be argued that Chen Jing too just like the appellant had knowledge, custody, control and possession of the raw opium in the said room.

A (22) Without putting Chen Jing to the stand and subjecting her to cross-examination, there is a wide gap in the prosecution's case. We acknowledge that the prosecution has the full and complete discretion to decide as to whether Chen Jing should be called as a witness. But if the failure to call Chen Jing would undermine the prosecution's case and prevent the prosecution from proving its case beyond reasonable doubt, then the Court has no choice but to acquit the appellant (*Ti Chuee Hiang v. Public Prosecutor* [1995] 2 MLJ 433, SC; and *Public Prosecutor v. Asnawi bin Yusuf* [2011] 4 MLJ 16, CA).

C **[60]** Aziah Ali JCA in *Azizan Yahaya v. PP* [2012] 8 CLJ 405, writing for the Court of Appeal, expressed the same sentiments at p. 413 of the report:

D (9) We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. The prosecution had failed to discharge its bounden duty of excluding access to the appellant's E room by others.

**[61]** Zulkefli Makinudin FCJ in *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113, writing for the Federal Court, applied the exclusion principle in this way at p. 123 of the report:

F (12) The Supreme Court in *Abdullah Zawawi* had therefore highlighted the danger of relying on a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may G have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further H compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to section 32(1)(i) I of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

**[62]** The principle of exclusion is now entrenched in our law. Equally important is to recognise the explanation by both the appellants that they were present in the condominium unit as visitors on the invitation of Ang. And the following findings of learned High Court Judge which were in favour of both the appellants must be considered and cannot be ignored:

(a) That the first appellant was fully clothed and it was not proved that the first appellant was only in his underpants was decided in favour of the first appellant (see p. 108 of the appeal record at jilid 1);

(b) That the fact that no keys to the condominium unit were found or seized was resolved in favour of both the appellants (see p. 109 of the appeal record at jilid 1);

(c) That the gas stove was not switched on was resolved in favour of both the appellants (see pp. 111 to 113 of the appeal record at jilid 1);

(d) That the learned High Court Judge did not accept the prosecution's version that the fan and the impulse sealer were switched on and His Lordship made a finding that these items were located in the master bedroom of the condominium unit (see pp. 113 to 114 of the appeal record at jilid 1);

(e) Pertaining to the hand swabs, the learned High Court Judge had ruled, at the end of the prosecution's case, in favour of both the appellants, in that their hands could, based on the evidence of SP6, be contaminated (see p. 66 of the appeal record at jilid 1);

(f) In regard to the test fittings of the clothes on the first appellant, the learned High Court Judge ruled that the evidence was inadmissible because no caution was administered (see p. 69 of the appeal record at jilid 1); and

(g) The learned High Court Judge also held that both the appellants were not tenants of the condominium unit (see p. 70 of the appeal record at jilid 1).

**The Second Issue**

**[63]** It concerned the failure of the learned High Court Judge to sufficiently appreciate the defence of the appellants. In this

A context, there is a passage in the judgment of the learned High Court Judge at p. 107 of the appeal record at jilid 1 that requires scrutiny. It reads as follows:

> Isu di hadapan Mahkamah adakah keterangan pembelaan tertuduh pertama dan tertuduh kedua itu boleh diberi kepercayaan dan jika sekiranya tidak boleh dipercayai adalah pembelaan kedua-dua tertuduh itu mempunyai kemungkinan sebagai benar (*Mat v. PP (supra)*).

**[64]** The above passage is erroneous. It construed *Mat v. PP* [1963] 1 LNS 82; [1963] 1 MLJ 263 wrongly. With respect, *Mat v. PP (supra)* did not say that the defence story even if it cannot be believed must be likely to be true. In misconstruing *Mat v. PP (supra)*, the learned High Court Judge had imposed a higher burden in law to the detriment and disadvantage of both the appellants.

**[65]** The findings of the learned High Court Judge as alluded to earlier coupled with the available evidence adduced by the prosecution showed that both the appellants were present in the condominium unit and their damning conduct of flight was highlighted. In their defence, both the appellants testified that they were present in the condominium unit on that fateful day as visitors – on the invitation of Ang. On hearing three or four explosions, both the appellants became frightened and decided to take cover. Now, the conduct of flight was challenged. SP7 conceded that he never identified himself or called the occupants of the condominium unit to open the door before he instructed his police personnel to force open the door. At p. 232 of the appeal record at jilid 2, in his cross-examination this was what SP7 said:

> Q: Adakah awak sebelum memotong grill atau memecah pintu hadapan memanggil penghuni rumah berkenaan?
>
> J: Saya tidak ada memanggil penghuni rumah berkenaan.
>
> Q: Adakah awak menjerit polis, buka pintu sebelum memotong pintu dan potong grill?
>
> J: Saya juga tak ada menjerit polis.
>
> Q: Jadi bila sampai di hadapan unit apartment berkenaan awak terus beri arahan untuk potong grill dan pecah pintu kayu di hadapan?
>
> J: Ya, benar.

**[66]** In our judgment, the conduct of flight, in the context of the present appeal, even if true, can be construed as a natural reaction of pure panic bearing in mind that three or four shots were fired by the police personnel in an attempt to gain entry into the condominium unit.

**[67]** Mohd Zawawi Salleh JCA in *Burhanuddin Benjamil lwn. PP* [2013] 1 LNS 149 resolved the issue of flight in favour of the defence as the arresting officer did not identify himself to the accused before the arrest was effected. We gratefully applied His Lordship's decision in deciding the present appeal before us.

**[68]** In regard to the presence of both the appellants at the condominium unit on that fateful day, we gratefully adopted the passage in the judgment of Edgar Joseph Jr SCJ, when His Lordship in delivering the grounds of judgment of the court in *Gooi Loo Seng v. PP* [1993] 3 CLJ 1; [1993] 2 MLJ 137, SC, aptly said at p. 5 (CLJ); p. 142 (MLJ):

> We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

**[69]** In open court, we announced our decision. It went like this:

> We have deliberated at great length and we are of the view that it is not safe to convict both the appellants. Consequently, we allow the appeals of both the appellants. The convictions and death sentences are hereby set aside. Both the appellants are acquitted and discharged.

**[70]** We restored freedom to both the appellants.